Tentative Rulings for January 28, 2014
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG00113 ***Coelho v. Coelho*** **(Dept. 403)**

11CECG01234 ***Neilson v. Urbina*** **(Dept. 503)**

13CECG01543 ***Vaughn v. Bank of America Home Loans, et al.*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

08CECG03210 ***Saf-T-Cab, Inc. v. Berchtold Equipment Co.*** **is continued to Thursday, February 20, 2014, at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Castro et al. v. Centex Homes et al.***, Superior Court Case No. 11CECG03485

Hearing Date: **January 28, 2014 (Dept. 402)**

Motion: Travelers' Demurrer to Centex Homes' Cross-Complaint

Tentative Ruling:

To sustain, with cross-complainant granted 10 days' leave to file a first amended cross-complaint. The time in which the cross-complaint can be amended will run from service by the clerk of the minute order. All new allegations in the amended cross-complaint are to be set in **boldface** type.

Explanation:

Travelers Property Casualty Co. of America and Travelers Indemnity Co. of Connecticut (collectively "Travelers") demur to the seventh cause of action of the cross-complaint of Centex Homes and Centex Real Estate Corp. (collectively "Centex").

The cross-complaint alleges that Travelers issued insurance policies naming Centex as insureds or additional insureds. The subject properties contain defects resulting in property damage from subcontractor, and Centex is liable for these damages. As required by Centex, the subcontractors obtained general liability insurance policies naming Centex as an additional insured. Under the terms of the policies, the insurer cross-defendants agreed to defend Centex against suits alleging property damage or bodily injury, including all claims, covered and uncovered. (Cross-Complaint ¶ 82.) Plaintiff's claims include property damage occurring during the policy periods. Some insurers agreed to participate in the defense of Centex subject to a reservation of rights, which creates a conflict of interest with Centex. (Cross-Complaint ¶¶ 86-87.)

The cross-complaint alleges that a dispute has arisen between Centex and the insurer cross-defendants in that Centex contends: (a) an allocation needs to be made between insurer cross-defendants and subcontractor cross-defendants regarding the cost of Centex' defense; (b) Centex is entitled to independent counsel in this action under Civ. Code § 2860 because insurer cross-defendants' reservation of rights letter(s) create significant conflicts of interest with Centex. (Cross-Complaint ¶ 89.) Insurer cross-defendants contend otherwise. (Cross-Complaint ¶ 89.)

The general demurrer will be sustained with leave to amend, and the Cross-Complaint alleges no facts showing the existence of an actual controversy.

A complaint for declaratory relief should show the following: (1) a proper subject of declaratory relief within the scope of Code of Civil Procedure section 1060; and (2) an actual controversy involving justiciable question relating to the rights or obligations of a party. (*Tiburon* v. *Northwestern Pacific Railroad Co.* (1970) 4 Cal.App.3d 160, 170.)

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 728.)

Civ. Code § 2860 limits conflicts justifying independent counsel to situations where (1) an insurer reserves its rights on a disputed issue the resolution of which could determine whether the insurer's policy covers the claim, and (2) the outcome of that issue can actually be controlled by counsel in the underlying action. (Civ. Code § 2860(b); *Long, supra*; *Gafcon, Inc. v. Ponsor & Assoc.* (2002) 98 Cal.App.4th 1388, 1421; *James 3 Corp. v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1102.)

The Cross-Complaint makes no allegation to the effect that the outcome of the coverage issue can be controlled by counsel retained by Travelers. Both parties discuss in detail the alleged conflicts claimed in relation to other construction defect matters, but the court should base its ruling on this demurrer on what is actually alleged in the pleading at issue. Here, Centex simply alleges no facts supporting the contention that the reservation of rights created a conflict entitling Centex to independent counsel. The cross-complaint does not allege that any aspect of its defense to plaintiffs' claims that could be controlled by counsel retained by Travelers. This needs to be fleshed out more in an amended cross-complaint.

Further facts must be alleged as to the allegation that an allocation needs to be made between insurer cross-defendants and subcontractor cross-defendants regarding the cost of Centex' defense. "The fundamental basis of declaratory relief is an actual, present controversy." (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 831.) A controversy is ripe "when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 588.) The Cross-Complaint contains no allegations of fact establishing a controversy ripe for adjudication, since the damages and costs to be allocated will not be determined until the conclusion of the construction defect action.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/27/2014 .
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***Pathology Associates v. Gwartz***
Case No. 13CECG02046

Hearing Date: January 28th, 2014 (Dept. 402)

Motion: Defendants' Demurrer to Complaint

Plaintiff's Motion for Discharge and Award of Attorney's Fees

Tentative Ruling:

To sustain the demurrer to the complaint, for failure to state facts sufficient to constitute a cause of action, without leave to amend. (Code Civ. Proc. § 430.10(e).) To deny plaintiff's motion for discharge. (Code Civ. Proc. § 386(b).) To deny plaintiff's motion for attorney's fees. (Code Civ. Proc. § 386.6(a).)

Defendants shall submit to this court, within 7 days of service of the minute order, an ex parte application dismissing the action as to the demurring defendant.

Explanation:

Demurrer: Plaintiff has not stated a valid claim for interpleader, because it has failed to allege facts showing that there is a reasonable likelihood that it will be subjected to "double vexation" if it obeys the court's order requiring it to pay the partnership distributions to Gwartz rather than to WMD, Inc.

"Any person, firm ... or other entity against whom double or multiple claims are made, or may be made, by two or more persons, which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims." (Code Civ. Proc., § 386, subd. (b).)

"Interpleader is an equitable proceeding by which an obligor who is a mere stakeholder may compel conflicting claimants to money or property to interplead and litigate the claims among themselves instead of separately against the obligor." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 237, p. 317.)

"A complaint in interpleader must show that 'the defendants make conflicting claims to [the subject matter], and that the [plaintiff] cannot safely determine which claim is valid and offers to deposit the money in court....' The right to the remedy of interpleader is founded on the consideration that a person is threatened not just with double liability, but with double vexation in respect to one liability. An interpleader action, however, may not be maintained 'upon the mere pretext or suspicion of double vexation; [the plaintiff] must allege facts showing a reasonable probability of double vexation[,]' or a 'valid threat of double vexation.'" (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607-608, internal citations omitted.)

Here, plaintiff alleges that the Fresno Superior Court entered an order on May 24th, 2013 in the underlying Gwartz litigation, and that Gwartz claims to be entitled to monies owed by plaintiff to WMD, Inc. under the terms of that order. (Complaint, ¶ 5a.) However, plaintiff also alleges that the court in the Gwartz litigation then entered another order on June 19th, 2013 "apparently staying enforcement of its order dated May 24th, 2013 as it relates to Plaintiff and WMD INC." (*Id*. at ¶ 5b.) Plaintiff also alleges that it owes WMD money for "services rendered by WMD INC to Plaintiff." (*Id*. at ¶ 6.) Plaintiff will also likely become obligated to make one or more additional payments to WMD in the future. (*Id*. at ¶ 7.)

Gwartz has made a demand for payment on plaintiff for any monies owed to WMD, Inc. (*Id*. at ¶ 8.) However, plaintiff has refused to make any payments to Gwartz because WMD has made claims that it is entitled to receive payments for services rendered by WMD to plaintiff. (*Ibid*.) Also, WMD claims that the June 19th, 2013 order prevents Gwartz from enforcing the May 24th, 2013 order. (*Ibid*.) Plaintiff claims that it is indifferent with respect to which of the defendants should receive the money, but that plaintiff is unable to safely determine which of the parties has the valid claim to any money currently owed, or owed in the future, to WMD. (*Id*. at ¶¶ 9, 10.) Therefore, plaintiff seeks to interplead any sums owed to WMD with the court and allow defendants to litigate their respective rights to the money while plaintiff is discharged from the action.

However, the problem with plaintiff's claim is that there is no longer an order in effect that stays the May 24th, 2013 assignment and turnover orders. While plaintiff contends that the June 19th, 2013 order "apparently stayed" the enforcement of the May 24th, 2013 orders, the court later issued an order on August 19th, 2013 that vacated the stay. (Exhibit 16 to defendants' request for judicial notice, August 19th, 2013 order granting relief from stay. The court intends to take judicial notice of Judge Culver Kapetan's order under Evidence Code section 452(c) and (d).) Therefore, the judicially noticeable facts show that there is no longer an order in effect that might have stayed the assignment and turnover orders previously issued by the court.

While plaintiff arguably might have stated a valid claim for interpleader at the time the complaint was filed on June 27th, 2013 because there was some doubt as to whether plaintiff was still obligated to pay WMD while the assignment and turnover orders were stayed, the court's subsequent order of August 19th, 2013 removed any doubt as to which party should receive the payments from plaintiff. Thus, plaintiff's complaint no longer states a valid claim for relief.

Plaintiff argues in opposition that the court should assume the truth of all of the allegations in the complaint in ruling on the demurrer, and since it has alleged that there were conflicting demands for the money and that it cannot reasonably determine which claimant has a valid claim to the funds, it has stated a valid claim for interpleader. However, while the court must generally assume the truth of all properly pleaded allegations in the complaint when ruling on a general demurrer, it does not have to assume the truth of contentions, deductions, or legal conclusions. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.) Also, the court does not have to assume the truth of the complaint's allegations where they are contradicted by

judicially noticeable facts, including court records and official acts of the court. (Code Civ. Proc. § 430.30(a); Evidence Code § 452(c), (d).) Thus, the court can sustain a demurrer based on court records that establish an absolute defense or some deficiency in the complaint. (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 191-192.)

Here, the court's judicially noticeable records and orders establish that the June 19th, 2013 order is no longer in effect, and that the assignment and turnover orders of May 24th, 2013 are no longer stayed. As a result, there is no longer a factual basis for plaintiff to claim that it may be exposed to double vexation if it pays Gwartz pursuant to the May 24th, 2013 orders because those orders were stayed by the June 19th order.

Nor has plaintiff alleged any other facts that would cast any doubt on whether the assignment and turnover orders might be valid and enforceable. Court orders are presumptively valid and the party challenging them has the burden of showing otherwise. (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427.) Here, plaintiff alleges no facts that would tend to show that the orders were not valid. While plaintiff does allege that WMD has claimed it has a right to payment from plaintiff (Complaint, ¶ 8), this allegation appears to be based largely on the existence of the June 19th, 2013 order, which is no longer in effect.

To the extent that plaintiff may be claiming that WMD's bare assertion of a right to be paid by plaintiff is enough to raise a reasonable likelihood that plaintiff will be subjected to double vexation, this contention is inconsistent with the plain language of the court's May 24th, 2013 assignment order, which clearly provides that the partnership distribution payments owed by Pathology Associates to WMD are to be paid to Gwartz instead. (Defendants' Request for Judicial Notice, Exhibit 4, Assignment Order, pp. 2-3. The court intends to take judicial notice of the court's orders under Evidence Code section 452(c) and (d).)

The May 24th, 2013 assignment order clearly states that "All payments due to Michael Weilert ('Weilert') and/or Genevieve de Montremare aka Genevieve Weilert ('Genevieve') (together 'Judgment Debtors'), to the extent necessary to pay the Judgment Creditors' judgment in full (including accrued interest through the date of payment) are hereby assigned to the Judgment Creditors. The payments covered by this Assignment Order include without limitation all payments presently due or to become due (a) to the Judgment Debtors, or (b) to entities wholly owned or controlled by the Judgment Debtors, namely… Michael Weilert, M.D., Inc. ('Weilert MD Inc.')" (*Ibid*.) Furthermore, the order states that it "pertains specifically to the following payments… Payments, distributions or partnership draws due to Weilert MD Inc. from Pathology Associates, a California general partnership…" (*Id*. at p. 3, ¶ 2d.) Finally, the order contains a warning in boldface and capital letters that "**FAILURE BY THE JUDGMENT DEBTORS TO COMPLY WITH THIS ORDER MAY SUBJECT THE JUDGMENT DEBTORS TO BEING HELD IN CONTEMPT OF COURT**." (*Id*. at p. 4, emphasis in original.)

Thus, while Weilert or WMD may contend that his own right to payment of partnership distributions is somehow superior to the court's order requiring the partnership to pay distributions to Gwartz, there is no longer any reasonable basis for

plaintiff to believe that it was not required to obey the court order now that the stay has been vacated. Indeed, the assignment order and turnover orders strongly warn that, if the judgment debtors fail to comply with them, they may be held in contempt of court. In other words, plaintiff had no reason to believe that WMD or the Weilerts had any valid basis for claiming a right to payment of the partnership distribution funds in light of the court order.

Nor is there any reasonable likelihood that plaintiff might be subjected to double vexation if it obeyed the court's assignment and turnover orders, since plaintiff cannot be held liable for obeying a valid court order. (*Glass v. Najafi* (2000) 78 Cal.App.4th 45, 51: defendant landlord not liable for evicting tenants pursuant to a writ of possession that was later set aside by the court, since defendant was acting pursuant to a properly issued court order at the time of the eviction, even though the writ was later determined to have been erroneously issued.) Thus, plaintiff has not alleged any facts that would tend to show that it might be subjected to double vexation if it complies with the court's assignment and turnover orders by paying Gwartz rather than WMD. As a result, the court intends to sustain the demurrer to the complaint for intervention for failure to state facts sufficient to constitute a cause of action.

Defendants have also argued that the demurrer should be sustained based on this court's lack of jurisdiction because the doctrine of exclusive concurrent jurisdiction applies to bar the complaint.

"Under the rule of exclusive concurrent jurisdiction, 'when two superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved.' The rule is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits. The rule is established and enforced not 'so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay in the administration of justice.' The rule of exclusive concurrent jurisdiction may constitute a ground for abatement of the subsequent action. 'An order of abatement issues as a matter of right not as a matter of discretion where the conditions for its issuance exist.' However, abatement is not appropriate where the first action cannot afford the relief sought in the second." (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 786-787, internal citations omitted.)

"Although the rule of exclusive concurrent jurisdiction is similar in effect to the statutory plea in abatement, it has been interpreted and applied more expansively, and therefore may apply where the narrow grounds required for a statutory plea of abatement do not exist. Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions. If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same

so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings." (*Id*. at 788, internal citations omitted.)

However, the appropriate remedy in cases where exclusive concurrent jurisdiction applies is to abate the second action, not dismiss it. (*Id*. at 791-792.)

"*Childs* held that where the rule of exclusive concurrent jurisdiction is applicable, dismissal of the subsequent action is improper. Citing *Lord v. Garland, Colvig v. RKO General, Inc*. and section 597, *Childs* ruled that where a plea in abatement is presented by demurrer, an interlocutory judgment should be entered to permit the court to retain jurisdiction over the subsequent action so that when a final determination is had in the prior pending action the court will be empowered to determine any remaining issues in the subsequent suit. 'We see no reason why the rule should not be generally the same in cases involving exclusive concurrent jurisdiction of courts within the same jurisdiction....'" (*Ibid*, internal citations omitted.)

In the present case, the doctrine of exclusive concurrent jurisdiction does apply, since the present case and the underlying *Gwartz* litigation both involve the same subject matter, and indeed the present case solely concerns whether Gwartz has a right to be paid under the orders issued by the court in the *Gwartz* case. While Pathology Associates is not a party to the underlying case, it could easily be brought into that case in order to enforce the judgment. In fact, the May 24th, 2013 orders specifically name Pathology Associates as one of the entities that is required to pay Gwartz. Moreover, the court in the *Gwartz* case has the power to order the same remedies sought in the present case, and there does not appear to be any reason that plaintiff could not have brought its complaint for interpleader in the underlying case after obtaining leave to intervene.

However, the proper remedy where the doctrine of exclusive concurrent jurisdiction applies is to abate the later filed action, not dismiss it. (*Plant Insulation, supra*, at 791-792.) Thus, even if the court were to sustain the demurrer based on exclusive concurrent jurisdiction, it could only stay the case until the issues underlying action had been fully resolved.

Defendants contend that the court may dismiss the complaint on demurrer based on exclusive concurrent jurisdiction. They cite to *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, in which the Court of Appeal affirmed the Superior Court's order sustaining a demurrer to a complaint without leave to amend based on the doctrine of exclusive concurrent jurisdiction. However, *Burkle* was an unusual case because there a party to a family law dissolution case had improperly filed a civil action against her ex-husband and an accounting firm based on alleged misconduct that occurred in the course of the dissolution action. The Court of Appeal agreed with the trial court that the civil case was essentially just a re-labeled family law matter, and that it should have been brought as part of the family law case. (*Id*. at 398-399.) Thus, it was proper for the trial court to sustain the demurrers without leave to amend. (*Ibid*.)

Here, while the doctrine of exclusive concurrent jurisdiction does apply, there is no reason to conclude that the action was improperly brought in this court rather than being filed in the underlying case. While it may have been preferable to have the issues of the present case litigated in the *Gwartz* case, it was not necessarily improper for the plaintiff to file the action separately, and this court does not "lack jurisdiction" in the fundamental sense of having no power to grant the relief sought. Therefore, the proper remedy would be to stay the present action pending final resolution of the underlying *Gwartz* matter, not dismiss it.

However, it would make little sense to stay the present case, since, as discussed above, the June 19th, 2013 order staying the orders in the *Gwartz* case has been lifted, and there is no longer any uncertainty about which party should be paid from the partnership distribution. In essence, the present case has become moot. There is no reason to stay the action where there are no longer any issues for the parties to litigate, and where the underlying complaint fails to state any facts constituting a claim for interpleader. Therefore, the court intends to simply sustain the demurrer based on failure to state facts sufficient to constitute a cause of action, without leave to amend.

Motion for Discharge and Attorney's Fees: Since the court intends to sustain the demurrer without leave to amend, the court also intends to deny the plaintiff's motion for discharge and for attorney's fees. Since plaintiff has failed to state a claim for interpleader, and it does not appear that there is any possibility that plaintiff could amend to cure the defect, there is no basis for the motion to discharge the plaintiff. In addition, plaintiff would only be entitled to its attorney's fees if the motion for discharge is granted. (Code Civ. Proc. § 386.6(a).) Since the court intends to deny the motion for discharge, the request for attorney's fees will also be denied.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/27/2014 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***In re: Julie Devlin, a minor***
Case No. 13CECG03385

Hearing Date: January 28th, 2014 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant the petition to compromise the minor's claim. (Probate Code § 3500 *et seq*., Code Civ. Proc. § 372 *et seq*.) The proposed order has been signed. The matter is off calendar. No appearances are necessary.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/27/2014 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(27) **Tentative Ruling**

Re: ***FFA Farm Labor Services, INC., et al. v. B&A International Farm Labor Services, INC., et al.***
Superior Court Case No. 13CECG03021

Hearing Date: **January 28, 2014 (Dept. 403)**

Motion: Motion to Quash Deposition Subpoena

Tentative Ruling:

Deny the motion to quash the subpoena deposition in part. Disclosure of the subject personal financial records is limited to the term specified in the cross-complaint – July, 2012 through February 13, 2013.

Explanation:

Balancing of privacy vs. discovery

Privacy protection is qualified, not absolute. Thus, disclosure may be ordered where the subject information is of a compelling public interest. (*Britt v. Sup. Ct. (San Diego Unified Port Dist.)* (1978) 20 Cal.3d 844, 865.) The court must balance the privacy interests with that of the necessity for discovery. (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 457-458; *Valley Bank of Nevada v. Superior Court (Burkett)* (1975) 15 Cal.3d 652, 657.) The level of sensitivity of the information must be correlate with the need for discovery. (*Hoffman Corp. v. Superior Court (Smaystrla)* (1985) 172 Cal.App.3d 357, 362.)

Here, the central claim to the cross complaint is plaintiffs' alleged use of defendant B&A's financial accounting systems to commit fraud. The B&A defendants allege the FFA plaintiffs used their relationship to B&A to acquire confidential information. (Cross-Complaint, pg. 3, ¶11-13.) The FFA plaintiffs then used this information to create, and subsequently delete, false invoices using the B&A's accounting software. (Cross-Complaint, pg. 3, ¶14a.) Also, "Cross-Defendants would write checks on B&A checking accounts payable to one another, their family and their friends, including directly payable to Cross-Defendant FFA for which B&A had no obligation therefore." (Cross-Complaint, pg. 4, ¶14c.) Essentially, the embezzlement alleged in the cross complaint is inextricably intertwined with the records sought by the B&A defendants. That is, the requested financial records have the potential to show how much and how many deposits are traceable to the B&A accounting software allegedly misappropriated by the FFA plaintiffs.

Limitation of disclosure

While the causes of action enumerated in the cross-complaint indicate that the FFA plaintiffs' financial information is relevant, that does not mean B&A should have unrestricted access to those records. (Code of Civil Procedure § 1987.1; *Cobb v. Superior Court* (1979) 99 Cal.App.3d 543, 550-551.)

Here, the deposition subpoena all requested financial records, "from 01/01/10, up to and including the present." However, the cross-complaint alleges the embezzlement occurred over an eight month time period from July, 2012 until February, 2013:

> 13. Unbeknownst to B&A, through the court of 8 months, Cross-Defendants, each of them, were using the confidential proprietary information of B&A to solicit B&A's customers through unfair competitive means
>
> 14. Also, during the months July 2012 through February 13, 2013, Cross-Defendants each of them, conspired with one another to embezzle substantial sums of money from B&A.

Cross-Complaint, pg. 3, ¶¶13 and 14.

In sum, the time period of the alleged embezzlement is far different than what was requested in the subpoena deposition, i.e., the subpoena deposition requested financial information for almost three years while the cross-complaint specified the acts occurred over an eight month period from July, 2012 through February, 2013. Moreover, the cross-complaint offers no other dates from which to reasonably infer the alleged embezzlement occurred over a longer time period. Thus, there is no justification for directing the FFA plaintiffs to provide their financial records for such an extensive term. Under CCP § 1987.1 the court directs the disclosure of the financial records be limited to the term July, 2012 until February 13, 2013.

Sanctions

Under CCP § 1987.2 the court may sanction the losing party to a motion to quash a subpoena deposition where the motion was unreasonable or unmeritorious:

> (a) Except as specified in subdivision (c), in making an order pursuant to motion made under subdivision (c) of Section 1987 or under Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive.

CCP § 1987.2(a).

Here, personal financial records are generally recognized as privileged. Thus, the motion to quash is reasonable and not made in bad faith. Under the discretion authorized in CCP § 1987.2, sanctions are not be issued on either party.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/27/2014.
(Judge's initials) (Date)

(23) **Tentative Ruling**

Re: ***Manuel H. Gonzalez and Peggy Gonzalez v. St. Agnes Medical Center, et al.***
Superior Court No. 13CECG01180

Hearing Date: Tuesday, January 28, 2014 (**Dept. 403**)

Motions: (1) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Manuel Gonzalez to Provide Response to Form Interrogatories, Set One, and for Sanctions

(2) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Manuel Gonzalez to Provide Response to Special Interrogatories, Set One, and for Sanctions

(3) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Peggy Gonzalez to Provide Response to Form Interrogatories, Set One, and for Sanctions

(4) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Peggy Gonzalez to Provide Response to Form Interrogatories, Set One, and for Sanctions

(5) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Manuel Gonzalez to Provide Response to Request for Nature and Amount of Damages, and for Sanctions

(6) Defendant William Wilson, M.D.'s Motion to Compel Plaintiff Peggy Gonzalez to Provide Response to Request for Nature and Amount of Damages, and for Sanctions

Tentative Ruling:

To GRANT Defendant's motions to compel Plaintiffs Manuel and Peggy Gonzalez to provide a response to Form Interrogatories, Set One, and Special Interrogatories, Set One. (Code Civ. Proc., § 2030.290, subd. (b).) Plaintiffs Manuel and Peggy Gonzalez are each ordered to serve verified initial responses, without objection, to Form Interrogatories, Set One, and Special Interrogatories, Set One, within 10 days after service of the minute order.

To GRANT Defendant's request for monetary sanctions in the amount of $600.00 against Plaintiffs Manuel and Peggy Gonzalez and in favor of Defendant William Wilson, M.D. (Code Civ. Proc., § 2030.290, subd. (c).) Sanctions and due and payable to Defendant's counsel within 30 days after service of the minute order.

To GRANT Defendant's motions to compel Plaintiffs Manuel and Peggy Gonzalez to provide a response to Request for Nature and Amount of Damages. (Code Civ.

Proc., § 425.11, subd. (b).) Plaintiffs Manuel and Peggy Gonzalez are each ordered to serve a responsive statement as to the nature and amount of damages being sought within 10 days after service of the minute order.

Explanation:

Motions to Compel Verified Initial Responses to Form and Special Interrogatories

On September 3, 2013, Defendant William Wilson, M.D. mail-served Plaintiffs Manuel Gonzalez and Peggy Gonzalez with Form Interrogatories, Set One, and Special Interrogatories, Set One. (Morrison Decl. ¶ 4 and Exhibit A.)

Pursuant to Code of Civil Procedure sections 1013, subdivision (a) and 2030.260, subdivision (a), each Plaintiff had 35 days from the date of service to serve their responses to Form Interrogatories, Set One, and Special Interrogatories, Set One. Since Defendant served Form Interrogatories, Set One, and Special Interrogatories, Set One, on September 3, 2013, timely responses were originally due by October 8, 2013. In his declaration, Defendant's counsel, Norman Morrison IV, states that, on October 16, 2013 and October 29, 2013, a letter was sent to Plaintiffs' counsel advising that the discovery responses were overdue and demanding responses by the close of business on October 25, 2013 and November 5, 2013. (Morrison Decl. ¶¶ 8 & 10.) However, each Plaintiff has failed to serve Defendant with any responses to Form Interrogatories, Set One, and Special Interrogatories, Set One, or request any extension of time in which to provide responses, as of December 27, 2013. (Morrison Decl. ¶¶ 12 & 14.)

Therefore, the Court grants Defendant's motions to compel Plaintiffs Manuel and Peggy Gonzalez to provide verified initial responses to Form Interrogatories, Set One, and Special Interrogatories, Set One.

Motions to Compel Response to Request for Statement of Damages

On September 3, 2013, Defendant William Wilson, M.D. mail-served Plaintiffs Manuel and Peggy Gonzalez with a Request for Nature and Amount of Damages pursuant to Code of Civil Procedure section 425.11 because Plaintiffs' complaint seeks to recover damages for personal injury. (Morrison Decl. ¶ 4 and Exhibit A.)

Pursuant to Code of Civil Procedure sections 1013, subdivision (a) and 425.11, subdivision (b), each Plaintiff had 20 days from the date of service to serve their responses to the Request for Nature and Amount of Damages. Since Defendant served the Request for Nature and Amount of Damages on September 3, 2013, timely responses were originally due by September 23, 2013. In his declaration, Defendant's counsel, Norman Morrison IV, states that, on October 16, 2013 and October 29, 2013, a letter was sent to Plaintiffs' counsel advising that the discovery responses were overdue and demanding responses by the close of business on October 25, 2013 and November 5, 2013. (Morrison Decl. ¶¶ 8 & 10.) However, each Plaintiff has failed to serve Defendant with any response to Defendant's Request for Nature and Amount of Damages, or request any extension of time in which to provide a response, as of December 27, 2013. (Morrison Decl. ¶¶ 12 & 14.)

Therefore, the Court grants Defendant's motion to compel Plaintiffs Manuel and Peggy Gonzalez to provide a response to the Request for Nature and Amount of Damages.

Sanctions

The Court awards $600.00 in monetary sanctions as the reasonable cost of attorney's fees and filing fees for the four motions to compel verified initial responses to Form and Special Interrogatories. (Code Civ. Proc., § 2030.290, subd. (c).)

However, since the two motions to compel response to Request for Nature and Amount of Damages are not motions under the Discovery Act and Code of Civil Procedure section 425.11 does not itself provide for the award of monetary sanctions, no monetary sanctions can be awarded for these motions.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/27/2014.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Britz, Inc. v. Kochergen***
Superior Court Case No. 13CECG02782

Hearing Date: January 28, 2014 (Dept. 403)

Motion: Defendant's Special Motion to Strike Complaint
Defendant's Demurrer to Complaint

Tentative Ruling:

To deny the Special Motion to Strike; to overrule the general demurrer. An answer will be served and filed within 10 days of the clerk's service of this minute order.

Explanation:

Special Motion to Strike:

The Anti-SLAPP Statute.

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 37 Cal.App.4th 855, 865.)

Two-Step Process

Code of Civil Procedure section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (Code Civ. Proc. § 425.16, subd. (b)(1).)" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.) Second, "if the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Ibid*.)

Protected Activity

An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;
(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(Code Civ. Proc. § 425.16, subd. (e).)

Here, the alleged wrongdoing falls squarely into categories (e)(1) and (e)(2). As a general rule, a cause of action arising out of the defendant's "litigation activity" directly implicates the right to petition and is subject to a special motion to strike. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89–90 [action for breach of release clause in contract subject to special motion to strike because alleged breach consisted of filing action purportedly released under the contract]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [the right to petition protected under section 425.16 includes the basic act of filing litigation]; *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1405, 1408–1409 [first prong of § 425.16 met by claim alleging that party breached settlement agreement by filing complaint in second action.].)

The "principal thrust or gravamen" of Britz' cause of action determines whether section 425.16 applies. (*Martinez v. Metabolife Internat., Inc*. (2003) 113 Cal.App.4th 181, 188; accord, *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319.) In the context of the anti-SLAPP statute, the "gravamen is defined by the acts on which liability is based, not some philosophical thrust or legal essence of the cause of action." (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1190; see also *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490–491 [the focus under the first prong of section 425.16 is the "allegedly wrongful and injury-producing conduct that provides the foundation for the claims"].)

Here, Britz' Complaint repeatedly states that Kochergen's filing of the second lawsuit constituted a breach of the settlement and release agreement executed in 2009. (Complaint 2:11-12; 6:18-21, 6:22-23.) It claims attorney's fees for having to defend itself and its directors as damages. (Complaint ¶¶ 16, 17, 24.) The instant action meets the first prong of section 425.16.

Probability of Success

Because Kochergen has demonstrated that Britz' lawsuit arises from his exercise of Kochergen's exercise of free speech or petition rights as defined in Code of Civil Procedure section 425.16, subdivision (e), Britz must establish a probability that it will prevail on the claims asserted against Kochergen. (*Equilon Enterprises v. Consumer Cause, Inc*., *supra*, 29 Cal.4th at p. 67.) Britz must prove that his complaint is legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by it is credited. (*Navellier*, *supra*, 29 Cal.4th at p. 89.) Britz' Complaint offers a single cause of action for breach of the 2009 settlement agreement. Specifically, Britz alleges that Kochergen breached the release provision, paragraph 2(a) by filing his 2012 litigation.

Breach of Contract

The "essential elements of a claim of breach of contract, whether express or implied, are the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damages to the plaintiff." *(San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.) The essential elements of contract formation are parties capable of contracting, their mutual assent, a lawful object and consideration. (Civ. Code, §§ 1550, 1565.)

"[T]he intention of the parties as expressed in the contract is the source of contractual rights and duties." (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co*. (1968) 69 Cal.2d 33, 38, fn. omitted (*PG & E*).) This principle is based upon Civil Code section 1636: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

"The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]" (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.) The trial court is required to provisionally receive extrinsic evidence to ascertain whether the contract language is "reasonably susceptible" to the interpretation advanced. (*PG & E, supra*, 69 Cal.2d at p. 40.) If the court decides that the language of the agreement, considering all of the circumstances, " 'is fairly susceptible of either one of the two interpretations contended for ...' [citations], extrinsic evidence relevant to prove either of such meanings is admissible." (*Id.* at p. 40, fn omitted.)

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d

861, 865.) Thus, it is only "[w]here the interpretation of contractual language turns on a question of the credibility of conflicting extrinsic evidence [that] interpretation of the language [becomes] not solely a judicial function. [Citations.]" (*Morey v. Vannucci*, *supra*, 64 Cal.App.4th at pp. 912-913.)

Here, the parties rely primarily on the plain language of the contract, paragraph 2 of the Settlement Agreement, to determine whether the instant litigation violates the Agreement. Paragraph 2 of the settlement agreement, is broken into five subparts, and consists of approximately one and one half pages. Britz relies primarily of the following boldface type in support of its argument that the 2012 litigation is barred:

> 2. Mutual Release
>
> a. Except with respect to the covenants, promises, and obligations arising from this Agreement, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties, on behalf of themselves and anyone who may succeed to their rights and responsibilities, such as their heirs, spouses, predecessors, successors, assigns, representatives, affiliates, partners, attorneys, agents, shareholders, officers, and employees, do hereby fully, finally, and forever release, relieve, waive and forever discharge each other and their respective heirs, spouses, predecessors, successors, assigns, representatives, affiliates, partners, attorneys, agents, shareholders, officers, and employees, of and from any and all causes of action, claims, debts, liability, obligation, account, and lien of any kind whatsoever, in law or in equity, *arising from the claims of or subject matter of the Dispute*, **or from any other mineral acres, mineral interests, or oil or gas interests, of any nature whatsoever within Oklahoma or elsewhere**, *including the well known as Tipton 2-29, whether or not presently known, alleged or which might have been alleged in connection with this Dispute*, whether suspected or unsuspected, disclosed or undisclosed, fixed or contingent. However, KOCHERGEN and BRITZ, INC. are and will remain co-tenants and co-owners on many oil and gas investments, some of which are the interests that KOCHERGEN retained when he deeded certain of his interests to BRITZ, INC. in connection with the document entitled Agreement," and which document was dated January 28, 1999. Neither Party's existing status as a co-owner and future rights respecting such interests are affected by this Agreement.

Britz claims that the Settlement Agreement and release was intended to release, and does bar, any future litigation arising from and oil and gas mineral interest wherever located, with the sole exception of co-tenancy and co-ownership interests. Kochergen, on the other hand reads paragraph 2(a) with an emphasis on the italicized language. Kochergen argues that paragraph (a) was only intended to release claims known and unknown related to the underlying litigation. ("Dispute" is defined as "the Action" which was defined as Fresno County Superior Court Case No. 07 CECG 03899.) Kochergen's interpretation is reasonable. The first category of claims are those "arising from the claims of or subject matter of the Dispute." This set of claims is then offset with a comma and the next set of claims is specified: "or from any other mineral acres, mineral interests, or oil or gas interests, of any nature whatsoever within Oklahoma or elsewhere, including the well known as Tipton 2-29, whether or not presently known,

alleged or which might have been alleged in connection with this Dispute." Again, this category of claims refers to the "Dispute." Britz would split the second category of barred claims after the clause "elsewhere, including the well known as Tipton 2-29" leaving a question as to what is described by the words "whether or not presently known, alleged or which might have been alleged in connection with this Dispute, whether suspected or unsuspected, disclosed or undisclosed, fixed or contingent." Britz has not shown that the Settlement Agreement was breached on its face. Extrinsic evidence will be needed to ascertain the intent of the parties in drafting the Settlement Agreement and it cannot be said that, at this stage, as matter of law, on the state of this evidence (see section entitled Request for Judicial Notice) whether the action has merit.

Demurrer to Complaint:

Kochergen presents a general demurrer under Code of Civil Procedure section 430.10, subdivision (e) on the dual grounds that the instant action by Britz is barred because it was required to be, but was not filed as a counterclaim in an Oklahoma action entitled *Kochergen v. CSW 2003 Exploration Limited Partnership et a*l., District Court, in and for the County of Roger Mills, Oklahoma (Oklahoma action); or the 2012 litigation in Fresno County (which serves as the basis for the breach of contract action) entitled *John A. Kochergen Properties, Inc. aka J.A. Kochergen Properties, Inc. v. David Britz et al*., Case No 12 CECG 03966 (2012 action).

Compulsory Cross-Complaints

A defendant may properly raise by demurrer the objection that a plaintiff's claim should have been pleaded as a compulsory cross-complaint in a prior action by the defendant against the plaintiff and that an independent action on the claim is barred by Code of Civil Procedure section 426.30 (former section 439). (See *Ranchers Bank v. Pressman* (1971) 19 Cal.App.3d 612, 616.) Code of Civil Procedure section 426.30, subdivision (a) provides: "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross–complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." A "related cause of action" is defined in section 426.10, subdivision (c) as "a cause of action which arises out of the same transaction, occurrence, or series of occurrences as the cause of action which the plaintiff alleges in his complaint."

"[B]ecause '[t]he law abhors a multiplicity of actions ... the obvious intent of the Legislature ... was to provide for the settlement, in a single action, of all conflicting claims between the parties arising out of the same transaction. [Citation.] Thus, a party cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demand or defenses; he may not submit his case in piecemeal fashion. [Citation.]' [Citations.] In furtherance of this intent of avoiding a multiplicity of action, numerous cases have held that the compulsory cross–complaint statute ... must be liberally construed to effectuate its purpose" of preventing piecemeal litigation. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 959.) "Because of the liberal

construction given to the statute to accomplish its purpose of avoiding a multiplicity of actions, 'transaction' is construed broadly; it is 'not confined to a single, isolated act or occurrence ... but may embrace a series of acts or occurrences logically interrelated.' " (*Id*. at p. 960; see also, e.g., *Currie Medical Specialties, Inc. v. Bowen* (1982) 136 Cal.App.3d 774, 777.)

The *Currie Medical* court, finding guidance in federal decisions construing the compulsory counterclaim statute, Federal Rules of Civil Procedure, rule 13(a), (28 U.S.C.) (hereafter, Rule 13(a)), held that the relatedness standard "requires 'not an absolute identity of factual backgrounds for the two claims, but only a logical relationship between them.' [Citation.] This logical relationship approach is the majority rule among the federal courts [citation]. At the heart of the approach is the question of duplication of time and effort; i.e., are any factual or legal issues relevant to both claims? [Citation.]" (*Currie Medical*, *supra*, at p. 777.) "In the breach of contract context, the rule means [that] any claims the defendant has against the plaintiff based on the same contract generally must be asserted in a cross-complaint, even if the claims are unrelated to the specific breach or breaches that underlie the plaintiff's complaint." (*Frog Creek Partners, LLC v. Vance Brown, Inc*. (2012) 206 Cal.App.4th 515, 538.) Furthermore, the related cause of action must be one that was in existence at the time of service of the answer (Code Civ. Proc. § 426.30, subd. (a)); otherwise, the failure to assert it in prior litigation is not a bar under the statute. (*Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864.)

Britz was not required to bring the instant action as a cross-complaint in the Oklahoma action, which resolved on November 22, 2013. First, the 2009 settlement agreement specifically exempts disputes arising out of co-ownership. ("Neither Party's existing status as a co-owner and future rights respecting such interests are affected by this Agreement.) The existing status in May of 2009, according to the Petition in the Oklahoma action in May of 2009 was that Kochergen and Britz were the owners of legal title of 99% of a fee interest in land referred to as "Section 11-11-26." Accordingly, the release and waiver provisions of the 2009 agreement did not apply.

Second, Code of Civil Procedure section 426.30 provides, in subdivision (a): [e]xcept as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." Code of Civil Procedure section 426.40, subdivision (c) provides and exception to this statute: "[a]t the time the action was commenced, the cause of action not pleaded was the subject of another pending action." The Oklahoma action was filed on March 21, 2013. Britz' Answer was filed June 26, 2013. Britz cross-complaint was filed September 24, 2013. The instant action was filed August 28, 2013. Britz did not need to raise the instant theory, that the 2013 action constituted a breach of the 2009 settlement agreement in its cross-complaint because an action alleging that claim was already pending.

Next, there remains the question of whether Britz was required to bring this action as a compulsory cross-complaint in the 2012 action, which is still pending. The original

complaint in the 2012 action was filed December 17, 2012. Britz demurred, but the demurrer came off calendar due to the filing of an amended complaint on April 9, 2013. Britz demurred again, and a second amended complaint was filed on September 6, 2013. Britz answered only the Second Amended Complaint. A cross-complaint would have to have been filed at that time. (Code Civ. Proc. § 428.50, subd. (a).) However this action was already pending. (Code Civ. Proc. § 426.40, subd. (c).)

Kochergen's Request For Judicial Notice:

The court may take judicial notice that various contentions have been made and or disputed by the parties, however, we cannot take judicial notice of particular facts alleged in the pleadings. (*Herrera v. Deutsche Bank Nat'l Trust Co*. (2011) 196 Cal.App.4th 1366, 1375["While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein"]; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749 [A court may not take judicial notice of factual assertions made in the documents of a previous case].)

1. The instant Complaint: This is judicially noticeable. The party's pleadings in this action constitute judicial admissions.
2. The Complaint in the 2012 action: This is judicially noticeable *only* as a record of the party's factual contentions in the 2012 lawsuit. The truth of the facts alleged are not judicially noticeable.
3. The First Amended Complaint in the 2012 action: This is judicially noticeable *only* as a record of the party's factual contentions in the 2012 lawsuit. The truth of the facts alleged are not themselves judicially noticeable.
4. The Second Amended Complaint in the 2012 action: This is judicially noticeable *only* as a record of the party's factual contentions in the 2012 lawsuit. The truth of the facts alleged are not themselves judicially noticeable.
5. The Britz defendants' Answer to the Second Amended Complaint in the 2012 action: This is judicially noticeable only as a record of the parties' affirmative defenses, as well as, admission or denials of material fact in connection with the 2012 lawsuit.
6. The original Complaint in the 2007 action: This is judicially noticeable *only* as a record of the party's factual contentions in the 2007 lawsuit. The truth of the facts alleged are not themselves judicially noticeable.
7. A portion of the points and authorities filed in support of Britz' demurrer to the original complaint in the 2007 action: This not judicially noticeable, save as evidence that such arguments were made.
8. Order Overruling Britz' Demurrer to original Complaint in 2007 action: This is not judicially noticeable, except to establish the demurrer was, in fact, overruled.
9. "A portion of the Answer of Britz and Glassman to the original Complaint in the 2007 action filed May 16, 2008: " This is judicially noticeable only as a record of the parties' affirmative defenses, as well as, admission or denials of material fact in connection with the 2007 lawsuit.
10. A portion of the "statement of Undisputed Facts of Britz', Inc. and Robert Glassman's Motion for Summary Judgment filed on December 23, 2008 in

support of summary judgment in 2007 action: The facts asserted therein are not judicially noticeable. All that is judicially noticeable is that the document making such arguments and contentions of fact was filed on that date.

11. Evidentiary documents filed on December 23, 2008 in the 2007 action in support of Britz' and Glassman's motion for summary judgment: The facts asserted therein are not judicially noticeable. All that is judicially noticeable is that the documents were filed on that date.
12. Petition of John Kochergen, Kochergen Family Limited Partnership, and Mike Kochergen against CSW 2003 Exploration Limited Partnership, Britz Inc., and Sunwest Fruit Co., Inc., Roger Mills County, Oklahoma, Case No. CV-2013-9, Filed March 21, 2013. ("Oklahoma case"): This is judicially noticeable *only* as a record of the party's factual contentions in the Oklahoma lawsuit. The truth of the facts alleged are not themselves judicially noticeable.
13. Answer of Britz, Inc. and Sunwest Fruit Co. to Oklahoma suit, filed June 26, 2013: This is judicially noticeable only as a record of the parties' affirmative defenses, as well as, admission or denials of material fact in connection with the Oklahoma lawsuit.
14. First Amended Answer, Counterclaim against Plaintiffs, and Cross-Petition against Defendant CSW filed by Britz and Sunwest on September 24, 2013, in the Oklahoma action: The truth of the matters stated in these documents cannot be judicially noticed. They only serve as a record of the claims made and documents filed.
15. Scheduling order filed on August 22, 2013 in Oklahoma Action: The court will take judicial notice that the document is a scheduling order of a sister court.
16. Defendant Britz' and Sunwest Fruit's Preliminary Exhibit List filed on October 23, 2013 in the Oklahoma action: The Court will accept that this document was filed on that day in the Oklahoma action.
17. Proof of service of Summons of the instant action on John A Kochergen indicating summons on August 30, 2013: The Court will take judicial notice of this document in accordance with California law.
18. A certified copy of the Agreed Journal Entry of the Judgment in the Oklahoma action signed and filed November 22, 2013: The court will take notice that this appears to be (i.e., what in California is called a docket) of the Oklahoma Court.
19. The court declines to take judicial notice of the "fact" that Britz failed to file a counterclaim in the Oklahoma action to the effect that such action was a breach of the 2009 settlement agreement, but accepts the evidence to the same effect in the Declaration of Thomas Ivester.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 1/27/2014.

(Judge's initials) (Date)

Tentative Rulings for Department 502

(6)

Tentative Ruling

Re: ***Templeton v. Kia Motors America, Inc.***
Superior Court Case No.: 11CECG04207

Hearing Date: January 28, 2014 (**Dept. 502**)

Motions: (1) By Plaintiff to compel production of documents by Defendant Kia Motors Corporation's PMQ re: seatbelts;

(2) By Plaintiff to compel production of documents by Defendant Kia Motors Corporation's PMQ re: airbags;

(3) By Plaintiff to compel Defendant Kia Motor America, Inc.'s further responses to requests for production of documents (set three)

Tentative Ruling:

To deny all three motions, and to grant Defendants' request for monetary sanctions in the amount of $1,000.00 per motion against Plaintiff, payable to Defendants' attorneys, within 30 days after service of this minute order.

Explanation:

Plaintiff Sharon Templeton ("Plaintiff") has failed to meet her burden on all three motions.

First, the only executed "meet and confer" declaration included with the three motions does not state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. (Code Civ. Proc., §§ 2025.480, subd. (b); 2016.040; decl. of Amir Salehi in support of Plaintiff's motion to compel the production of documents by Kia Motors Corporation PMQ re: airbags and seatbelts, and Kia Motors America, Inc.'s responses to request for documents (set 3), ¶¶14-16.) The declaration of Amir S. Salehi in support of Plaintiff's motion to compel the production of documents by Kia Motors Corporation PMQ re: airbags and seatbelts, and Kia Motors America, Inc.'s responses to request for documents (set 3), attaches only exhibits A through C. Exhibits D through L referenced in Mr. Salehi's declaration are not attached to that declaration.

Concerning the motion to compel the production of documents of Kia Motor Corporation's PMQ re: seatbelts, while it has a declaration of Amir Salehi attached, the declaration is incomplete and unsigned.

The motion to compel the production of documents of Kia Motor Corporation's PMQ re: airbags, is unaccompanied by any declaration at all.

Second, Code of Civil Procedure section 2025.480, subdivision (b), requires that a motion to compel answers or to produce documents at deposition must be made no later than 60 days after the completion of the record of the deposition.

Code of Civil Procedure section 2031.310, subdivision (b)(2), requires that notice of the motion be given within 45 days of service of the response. (Code Civ. Proc., § 2031.310, subd. (c).)

The Court is unable to determine from the motions whether they are brought timely, even taking into consideration the September 9, 2013, request for a pre-trial discovery conference. Assuming the person-most-qualified depositions took place on June 21st or June 22nd (as this Court can best determine), it would appear that more than 60 days would have passed after the completion of the record of the deposition, but this is unclear and Plaintiff has not met her burden to show the motion is timely. Because only documents are sought by way of the motions to compel concerning the person-most-qualified depositions, the 60 days begins to run when the objections were served. (*Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123, 134.)

Concerning the document requests (set three), the Court has no information at all to determine if the motion is timely. The time limit on motions to compel further responses is jurisdictional. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1409-1410.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1-27-14.
(Judge's initials) (Date)